BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to establish procedures for the treatment of commercial agreements not subject to the filing requirements of § 252 of the Telecommunications Act of 1996.	**Application No. C-3535/PI-111**

QWEST CORPORATION'S INITIAL COMMENTS

Qwest Corporation ("Qwest") submits its initial comments as directed by the Commission's Order Opening Docket and Seeking Comment (the "Order") dated January 18, 2006 as follows:

Introduction

As examples of the issues the parties should address in their comments, the Order asks: (1) whether there is a need for procedures to ensure consistent treatment of commercial agreements, including whether carriers should receive an acknowledgement from the Commission that an agreement need not be filed; (2) whether it is "important to have procedures in place to ensure that all similar agreements are treated alike;" and (3) whether the Commission should "make a forum available in cases where there may be a dispute or question as to the applicability of the Commission's jurisdiction to approve an agreement."

All of these questions must be answered in the context of sections 251 and 252 of the federal Telecommunications Act of 1996 (the "Act"), which define the scope of

agreements that must be filed with the Commission under section 252. Qwest agrees that a uniform standard must be used, but the standard for determining which agreements between carriers must be filed for approval with state commissions is already set forth in sections 251 and 252 of the Act, as well in an interpretive ruling from the FCC. Any other standard would lack the objective clarity provided by the existing law.

Thus, although not expressly identified in the Order, the basic, threshold issue that the Commission must resolve is the standard to apply to determine whether an agreement should be submitted for the Commission's review and approval. Once that threshold determination is made, a relatively simple set of rules can provide the necessary procedures to ensure that similar agreements are treated alike.

A. The Section 252 Filing Requirement Applies Solely To Interconnection Agreements Involving Services Or Elements Required By Section 251.

1. Overview

Under section 252 of the Act and the FCC's binding *Declaratory Order*[1] that interprets section 252, telecommunications carriers are only required to file for approval by state commissions "interconnection agreements," which are defined as agreements with other competitive local carriers that relate to ongoing obligations to provide services required under sections 251(b) and (c). The authority of state commissions to review and approve interconnection agreements is limited to agreements that involve such

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[1] Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337 (Oct. 4, 2002) ("*Declaratory Order*").

obligations.

Pursuant to binding rulings of the U.S. Court of Appeals for the D.C. Circuit[2] and the Federal Communications Commission's ("FCC's") *Triennial Review Remand Order* ("*TRRO*"),[3] Qwest no longer has any duty under section 251 to provide certain network elements and services, such as switching and shared transport. Qwest's voluntary decision to provide these and other "de-listed" elements and services through commercial agreements does not involve an *ongoing obligation* to provide services required under sections 251(b) or (c), and there is, therefore, no requirement for Qwest to file such agreements for approval by state commissions.

The Act represents an effort by Congress to implement, through a single federal statute and FCC rules, a comprehensive pro-competitive telecommunications policy throughout the United States. By establishing requirements for carriers to interconnect their networks and for ILECs to, among other things, lease piece-parts of their networks to competitors, the Act seeks to promote competition in local exchange markets.[4] Congress's goal was not just pro-competitive, it was also deregulatory. Congress contemplated a system where the markets govern the delivery of telecommunications services. For example, Congress expressed the goal of simultaneously moving to a "*pro-competitive, deregulatory system*" to replace the heavily regulated environment.[5]

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[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 568, 573, 595 (D.C. Cir. 2004) ("*USTA II*").

[3] Order on Remand, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Dkt. Nos. WC 04-313/CC 01-338, FCC 04-290, 2005 WL 289015 (February 4, 2005) ("*TRRO*").

[4] *TRO* ¶ 1.

[5] It is clear from the legislative history that the "goals of the Act were to provide for a *pro-competitive, deregulatory national framework* 'designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to technology . . . .'" *Id.* ¶ 62 n.198, quoting Joint Manager's Statement, S. Conf. Rep. No. 104-

In other words, Congress mandated a telecommunications industry in which the marketplace and, in particular, arms-length privately-negotiated commercial agreements, would set the rates, terms and conditions of inter-carrier transactions.[6] A requirement to submit for Commission approval agreements that do not contain section 251 obligations violates Congress's deregulatory intent.

As shown below, the language of section 252, the FCC's *Declaratory Order*, and the Act's deregulatory purpose all establish that only agreements between ILECs and CLECs that relate to ongoing obligations to provide services required under sections 251(b) and (c) must be filed for approval with state commissions under section 252. In response to the Commission's request for comments on whether there is a need for procedures to ensure consistent treatment of agreements, application of this standard will ensure such treatment.

2. The Duties Imposed by Sections 251(b) and (c)

The duties of ILECs and CLECs are described in section 251. Section 251(b) requires both ILECs and CLECs to: (a) allow the resale of each others' services; (b) provide number portability; (c) provide dialing parity; (d) provide access to rights-of-way; and (e) establish reciprocal compensation arrangements. Section 251(c) defines four other requirements that apply only to ILECs: (a) provide interconnection of the ILEC network to other networks; (b) provide access to UNEs; (c) allow CLECs to resell

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230, 104th Cong., 2d Sess. 113 (1996) (Joint Conference Report) (emphasis added).

[6] While the Act requires carriers to enter into "interconnection agreements" that set forth the terms and conditions for interconnecting their networks and for the leasing of network elements by competitive local exchange carriers ("CLECs") from incumbent local exchange carriers ("ILECs"), Congress has established a preference for negotiated interconnection agreements instead of agreements imposed by regulatory fiat. Thus, even where regulatory mandates still govern, they are designed to mimic conditions in the competitive marketplace. *See, e.g.,* 47 U.S.C. § 252(a).

services at wholesale rates; and (d) provide for collocation of CLEC equipment in ILEC buildings. Each of these requirements imposes specific duties that are defined further in the FCC's rules and orders implementing the Act.

The Act requires carriers to set forth the terms and conditions relating to the duties imposed by sections 251(b) and (c) in negotiated or arbitrated interconnection agreements that must be filed with state public utility commissions for approval.[7] Significantly, in one of its binding orders, the *Declaratory Order*, the FCC concluded that the *only* agreements carriers must file for approval are interconnection agreements that create *ongoing obligations* relating to duties imposed by sections 251(b) and (c).[8] Consistent with the Act's deregulatory purpose, there is no requirement for carriers to file and seek regulatory approval of agreements that do not address the section 251(b) and (c) requirements. Correspondingly, there is no federal delegation of jurisdiction to state commissions to require, provide, or withhold such approval.

3. The Filing Standard Established by the FCC's *Declaratory Order* and Section 252

In 2002, Qwest filed a petition with the FCC seeking a declaratory ruling defining the scope of the section 252(a)(1) requirement that carriers file agreements with state commissions for review and approval. The petition requested the FCC to define which agreements constitute "interconnection agreements" that must be filed with state commissions under section 252. The FCC's *Declaratory Order* issued in response to

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[7] 47 U.S.C. § 252(e)(1).

[8] Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, ¶ 8 (Oct. 4, 2002) ("*Declaratory Order*").

Qwest's petition sets forth explicit standards that state commissions and carriers must apply to determine if an agreement should be filed. The standard is that ILECs must, pursuant to section 252, file any agreement that "creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation."[9] The FCC characterized this standard as properly balancing the right of CLECs "to obtain interconnection terms pursuant to section 252(i)" with the equally important policy of "removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs."[10]

The FCC conclusively ruled that there is no requirement that an ILEC file *all* agreements:

> We . . . disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier . . . . Instead, we find that only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1).[11]

The FCC's ruling is supported by the plain language of section 252. There are two portions of section 252 that discuss the obligation of parties to file agreements with state commissions. The first, section 252(a)(1), states:

> Upon receiving a request for interconnection, services, or network elements *pursuant to section 251 of this title*, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. *The agreement . . . shall be submitted to the State commission under subsection (e) of this section.*[12]

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[9] *Declaratory Order* ¶ 8 (italics in original; underlining added).

[10] *Id.*

[11] *Id.* n.26 (italics in original; underlining added).

[12] 47 U.S.C. § 252(a)(1) (emphasis added).

The filing requirement is thus expressly premised on an agreement's provision for services or elements provided "pursuant to section 251."

Section 252(e)(1) sets forth the second reference to filing requirements:

> Any interconnection agreement adopted by negotiation or arbitration *shall be submitted* to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[13]

The "interconnection agreements adopted by negotiation" language refers to section 252(a)(1), which, as discussed above, relates only to services or elements required by section 251. Second, the reference to agreements "adopted by . . . arbitration" relates to section 252(b) and (c), the subsections that define state commissions' duties and powers to arbitrate agreements. Section 252(c)—which defines the standards for arbitration—requires a state commission, in exercising its section 252 authority, to "ensure that such resolution and conclusions meet the requirements of *section 251* of this title, including the regulations prescribed by the [FCC] pursuant to *section 251* of this title."

For both negotiated and arbitrated agreements, the filing requirement and state commission approval authority explicitly relate back to services required under section 251. Thus, the filing obligations of section 252 arise only if a section 251 service or element is the subject of the agreement. In the *Declaratory Order*, the FCC interpreted the section 252 filing requirement in precisely the same way.

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[13] *Id.* § 252(e)(1) (emphasis added).

4. The Absence of State Approval Authority Over Agreements That Do Not Contain Section 251(b) and (c) Obligations is Supported by the Principle That States Only Have Authority Under the Act That Congress Expressly Delegated.

The Act represents a clear assertion of federal authority over telecommunications regulation. The Supreme Court has ruled that the Act *preempts* state regulation with regard to matters covered by the Act.[14] Thus, the FCC—not state commissions—has the primary responsibility, subject to federal court review, to adopt rules that lawfully implement the Act.[15] At the same time, Congress delegated several specific and narrowly-defined tasks to state commissions. These tasks, and the state commission's authority to perform them, derive from the Act, not from the state commission's state statutory authority.[16] Thus, the Tenth Circuit has ruled that Congress "preempted state regulatory authority over some aspects of local phone service" and has described the state commission's authority on those issues as a federal "gratuity." [17] The Seventh Circuit likewise has characterized the state commissions as "deputized federal regulators."[18] Relatedly, the Ninth Circuit ruled that "the FCC's implementing regulations . . . must be considered part and parcel of the requirements of the Act."[19]

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[14] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6 (1999) ("*Iowa Utilities Board*").

[15] *Id.*, 525 U.S. at 378 (based on section 201(b) of the Act, "[t]he FCC has rulemaking authority to carry out the 'provisions of the Act,' with include §§ 251 and 252").

[16] *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 343 (7th Cir. 2000) ("*MCI Telecom*") ("authority to act [is] derived from provisions of the Act and not from [its] own sovereign authority"); *see also* Richard J. Pierce, Jr., *Administrative Law Treatise* §14.2 ("An agency has the power to resolve a dispute or an issue only if Congress has conferred on the agency statutory jurisdiction to do so.").

[17] *MCI Telecommunications Corp. v. Public Service Commission of Utah*, 216 F.3d 929, 938 (10th Cir. 2000) ("Thus, with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity.").

[18] *See MCI Telecom*, 222 F.3d at 343-44.

[19] *US West Communications v. Jennings*, 304 F.3d 950, 957 (9th Cir. 2002).

Accordingly, state commissions are required to make their decisions consistent with the Act and only have the powers that Congress has unequivocally delegated to them.

One of the limited functions Congress delegated to the states is the power to approve both arbitrated and negotiated interconnection agreements addressing the terms and conditions of services required by section 251.[20] However, a commercial agreement that does not address a section 251(b) or (c) service or element is not an "interconnection agreement" governed by that section of the Act and thus do not fall within the scope of the Commission's review and approval authority under section 252.

Indeed, the Commission recently approved the Arbitrator's Ruling in Docket No. C-3351, in which the arbitrator concluded that the FCC generally acted to take away the ability of state commissions to determine or approve rates pursuant to sections 251 and 252 of the Act for those elements the FCC "de-listed" from unbundling obligations in the TRRO. Though the arbitrator's discussion is somewhat difficult to penetrate, the arbitrator could not have reached the conclusion he did without concluding that the section 252 process does not apply to "de-listed" network elements.

B. The Commission Should Follow The FCC's Clear Standards to Avoid Unnecessary Filings and Review of Commercial Agreements.

A standardless requirement to submit all commercial agreements for review by the Commission or Commission Staff would be cumbersome for both carriers and the Commission. Similarly, a permissive standard which may be subject to differing interpretations and applications is not workable. In this proceeding, the Commission

[20] 47 U.S.C. § 252(e)

can articulate a clear, objective standard that balances (a) the Commission's need to ensure that interconnection agreements involving ongoing obligations under sections 251(b) or (c) of the Act are properly filed and approved; with (b) the limitations placed on the Commission's jurisdiction by those same sections and the FCC. And the Commission can do so simply by echoing the standard articulated by the FCC's *Declaratory Order*. As noted above, under the *Declaratory Order*, if an agreement does not contain "an ongoing obligation relating to section 251(b) or (c)," it is not subject to Commission review or approval.

If there is a dispute, disagreement, or question among contracting parties as to whether an agreement falls within section 252's filing standard, then the Commission should have procedure available to ILECs and CLECs to submit an agreement for Commission review and a section 252 determination. In the *Declaratory Order*, the FCC confirmed the authority of the state commissions to make section 252 det3erminations:

> [W]e believe that the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements. Indeed, we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements.

Thus, the Commission should have a procedure for the opening of a docket to consider a CLEC's or ILEC's petition as to whether a particular agreement falls within the filing standard.

Accordingly, Qwest proposes that the Commission resolve this docket by simply concluding that:

If an incumbent local exchange carrier enters into an agreement with a competitive local exchange carrier that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation, the agreement must be filed with the Commission for approval under 47 USC § 252. Any agreement that does not create an ongoing obligation with respect to services provided under 47 USC § 251(b) or 47 USC § 251(c) between an incumbent local exchange carrier and a competitive local exchange carrier shall not be filed with the Commission for approval.

If, however, the Commission would prefer to initiate a formal rulemaking and establish formal rules around the filing process, the Commission could adopt the above conclusion as a rule, and add procedural guidelines for initiating actions to determine whether an agreement meets the standard – along the lines of the following:

Rule 1: Filing Agreements Between Carriers for Approval Under 47 USC § 252.

If an incumbent local exchange carrier enters into an agreement with a competitive local exchange carrier that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation, the agreement must be filed with the Commission for approval under 47 USC § 252. Any agreement that does not create an ongoing obligation with respect to services provided under 47 USC § 251(b) or 47 USC § 251(c) between an incumbent local exchange carrier and a competitive local exchange carrier shall not be filed with the Commission for approval.

Rule 2: Proceeding to Determine Filing Requirement.

(a) If any local exchange carrier or Commission Staff reasonably believe that an agreement should be filed for approval pursuant to Rule No. 1, then that carrier or Commission Staff may initiate a proceeding by filing a petition requesting that the Commission determine whether the agreement in question should be subject to the approval requirements set forth in 47 USC § 252 as implemented and interpreted by the FCC. The Commission may also initiate such a proceeding on its own motion.

(b) In any proceeding initiated pursuant to Rule 3(a), the Commission shall allow for at least two rounds of briefs and oral argument addressing whether the agreement meets the governing filing standard. The Commission may order additional proceedings if deemed necessary by the hearing officer. If the Commission determines that the agreement is subject to Rule 1, then the Commission shall consider as part of that same proceeding whether the agreement should be approved under the criteria

set forth in 47 USC § 252.

It is important that if any such rules concerning these issues are enacted, then the rulemaking process should be followed. Currently, the Commission utilizes an attachment to a 2003 order from Docket No. C-1128, Progression Order No. 3, as the procedural rules for mediating and arbitrating interconnection agreements. Those rules should be formalized in a rulemaking, and the rules above should be added to those rules for mediation, arbitration, and opt-in, as procedures to be followed for agreements entered without intervention from the Commission.

Conclusion

Qwest agrees with the apparent preliminary conclusion of the Commission in the Order that defined filing standards will help ensure that similar agreements are treated alike. The standards Qwest proposes above can help the Commission achieve that goal, though enacting formal rules may not be necessary to articulate and implement the standards set forth in the FCC's *Declaratory Order*. Qwest welcomes the opportunity to work with Commission Staff and other participants in this docket to further develop and refine these issues.

Dated Friday, April 14, 2006.

Respectfully submitted,

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